3Neutral Citation No: [2020] NIFam 3 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* OHA11182 *Delivered:* 07/02/2020

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

ON APPEAL FROM THE MASTER

BETWEEN:

RACHEL ELIZABETH PITMAN

Plaintiff/Appellant;

-and-

PHILIP JOHN PITMAN

Respondent.

O'HARA J

Introduction

[1] This is an appeal by Mrs Pitman from a decision of Master Bell delivered in June 2018. It involves a couple in whose ancillary relief proceedings the Master had started to hear evidence in September 2017. The hearing was adjourned part-heard and was scheduled to resume in February 2018. At the point when the hearing was adjourned Mrs Pitman was giving evidence but had run into serious difficulties. Her then legal representatives were given permission to speak to her before the case resumed and they were directed by the Master to make certain enquiries. With the added input of newly briefed senior counsel they gave Mrs Pitman certain advice. As a result a matrimonial agreement was signed by both parties on 27 February 2018 in full and final settlement of the case. It was made a rule of the court by the Master that day.

[2] The Master was not informed that a "side agreement" had also been reached and signed that day. He was not aware of the existence of the side agreement, never mind its terms.

[3] In the weeks following 27 February Mrs Pitman refused to comply with her obligation to transfer to Mr Pitman her interest in the matrimonial home. She was to do this in consideration of him paying her £114,000. When she continued in her failure to meet her obligations Mr Pitman applied to the Master to exercise his powers under section 33 of the Judicature (Northern Ireland) Act 1978 to sign a deed of transfer on behalf of Mrs Pitman. On the hearing of that application the Master asked junior counsel for Mrs Pitman why he should not do so, especially since she had not applied to set aside his order nor filed any notice of appeal from it. After some delay counsel submitted a written position paper on behalf of Mrs Pitman in which he disclosed the existence of the side agreement and relied on it to submit that the matrimonial agreement was now null and void and that the application for ancillary relief should be relisted for hearing.

[4] The Master heard submissions on the issue, rejected the position of Mrs Pitman and signed the deed of transfer. It is against that decision that this appeal has been brought.

[5] On the appeal Ms O'Grady QC represented Mr Pitman as she has done throughout the proceedings. Mr Brian Fee QC appeared for Mrs Pitman with Mr James Anderson of counsel. For reasons which will appear below it is relevant to note that they and their solicitors are Mrs Pitman's third set of legal representatives. I am grateful to counsel who appeared before me for their submissions and assistance.

History of marriage and proceedings

[6] Mr and Mrs Pitman are wealthy individuals, Mr Pitman more so than Mrs Pitman. They married in 2012 and separated in 2014. Their son is now six years old. Mr Pitman is quite some years older than Mrs Pitman and much of his wealth was acquired before the marriage. In these circumstances the appropriate division of assets should not have been particularly complex.

[7] A complication arose from a number of issues including the fact that Mrs Pitman who is a qualified accountant employed by a public body, contended that the settlement of the ancillary relief proceedings should reflect the fact that her career had been set back by reason of her having had their son. Mrs Pitman's medical records were relevant, or potentially relevant, to this issue so they were obtained by Mrs Pitman, provided to her first solicitors and then disclosed by them on discovery to Mr Pitman's representatives.

[8] By the time the hearing started in September 2017 Mrs Pitman had changed solicitor, Ms Kristina Murray now representing her and instructing Ms Hayley Gregan of counsel. As it turned out Mrs Pitman was in some form of dispute with her first solicitors who did not release papers to Ms Murray. Mrs Pitman herself

provided the medical records to Ms Murray. This helped in preparing for the case to be in a position to start.

[9] During cross-examination of Mrs Pitman Ms O'Grady asked a series of questions about differences between the entries in the medical records provided by her first solicitor and those subsequently provided by Ms Murray. By way of example the second set provided by Ms Murray included references to Mrs Pitman being bullied by her boss at work and having longstanding problems in 2009. They also referred to stress at work in 2009. These entries were not present in the records initially provided.

[10] When asked about the two different versions Mrs Pitman answered, referring to the fuller second set:

> "I have no idea, these notes are not my notes, I have never altered doctor's notes ever, these are the only time I have ever seen my medical notes other than when I handed them to (my first solicitors). So these have not been retyped by me. If that is the allegation I am on oath and I categorically state on oath that I have not altered these notes. I have no idea how this has happened."

[11] This answer was, to say the least, entirely incorrect and misleading. As the evidence before me from Mrs Pitman revealed she herself had originally obtained her medical records from her GP at the request of her first solicitors. She read through them before she forwarded them to her solicitors. On doing so she was concerned, she said, about the accuracy of some of the history which had been recorded. For that reason she approached her GP and explained her concerns with the result that he altered (or corrected) the records. In her evidence to me she said that she did this in case her employer ever sought the records (as it might have done because she had been off work on extensive sick leave). She asserted that she did not ask for any amendments to be made in order to improve her position in the ancillary relief proceedings.

[12] The reason that this became known was that when her GP corrected various entries in her records she passed the amended ones to her first solicitors and kept the originals. Then, in a remarkable development, when Ms Murray needed to see the records Mrs Pitman gave her the originals, unamended. Ms Murray's evidence to me confirmed that Mrs Pitman gave her authority to release those records to Mr Pitman's solicitors who therefore had two sets which were quite different in respects which were capable of damaging her case and affecting the Master's ruling.

[13] The difficulty faced by Mrs Pitman's legal representatives when the hearing before Master Bell adjourned was her emphatic denial that the second set of notes were her notes at all and her assertion that when she saw her notes in cross-

examination it was the only time she had ever seen them other than when she gave them to her first solicitors. She had also asserted "I have no idea how this has happened." If and when the hearing resumed before the Master he was going to receive this information. It was bound to affect Mrs Pitman's credibility which was important on a number of issues, especially her claim to have suffered career detriment. It also left her extremely vulnerable to an allegation of perjury. All that she had needed to say in cross-examination in the first place was that she had asked her doctor to correct some inaccuracies in the history and that he had done so willingly. Instead she denied any knowledge of the unamended notes.

[14] In her evidence to me Mrs Pitman accepted that her evidence to the Master was wrong and conceded that it was capable of being perceived as a lie. However, she maintained that it could not be perjury because "only a lie which is material is perjury". This was a view she had formed when she googled "perjury", a step which she took later after Ms Murray engaged senior counsel, Mr McCollum QC, to advise on the risk of prosecution. This had been done before the case was scheduled to resume in February 2018.

[15] Mr McCollum's advice, supported by Ms Murray and Ms Gregan, was to the following effect:

- The Master would most probably refer the case to the PPS for investigation for perjury, either on his own initiative or at the request of Mr Pitman's representatives.

- The hearing of her application for ancillary relief might be adjourned and therefore delayed pending the outcome of any investigation

- On conviction, if there was a conviction, there would be a real risk of imprisonment.

This advice was given at a consultation on 20 February, a week before the case was scheduled to resume. Ms Murray's consultation note ends with the following note of what Mrs Pitman said:

> "Thank you for letting me consult with Liam [McCollum}. I needed closure. That's my personality. I know now there is no hope. I need to know that I did everything and that's the only way I can park it."

By then negotiations had progressed on what lump sum Mr Pitman would have to pay to buy out Mrs Pitman's interest in the matrimonial home and on how a side agreement to protect Mrs Pitman might read.

[16] The negotiations progressed with an agreement being reached on what Mr Pitman would pay to her and what he would contribute by way of maintenance

and school fees for their son. The amount paid to Mrs Pitman for herself was affected by the perjury issue hanging over her. It was less than she might otherwise have expected or aspired to, even allowing for the marriage being short. But Mrs Pitman wanted to protect herself from the risk that she would settle the case and then find that Mr Pitman reported her for alleged perjury in any event.

[17] It was in these circumstances that the side agreement was drawn up on behalf of Mrs Pitman and signed by both parties. It is in the following terms:

> "Side Agreement to the Matrimonial Agreement dated 27 February 2018
>
> (1) The petitioner agrees to the terms of the matrimonial full and final agreement dated 27 February 2018 on foot of the AR applications.
>
> (2) This side agreement is strictly confidential between the parties and their legal advisors and neither party nor their legal advisors nor any other person on their behalf shall be at liberty to disclose the terms of this side agreement to any other third party. Failure to comply with this requirement renders null and void the matrimonial full and final agreement entered into between the parties.
>
> (3) The matrimonial full and final agreement is subject to the respondent's agreement that neither the respondent or anyone on his behalf either now or at any time hereafter or the respondent's legal advisors or anyone on their behalf either now or at any time hereafter will report any matters whatsoever touching upon the conduct of these proceedings or the evidence given therein to the PPS or any prosecuting authority.
>
> (4) In the event that the terms herein are breached, thereby rendering null and void the terms of the matrimonial full and final agreement between the parties, then the petitioner is at liberty to have her ancillary relief application relisted before the court under the provision of liberty to apply for the purpose of further pursuing her claim.
>
> This has been read and understood by both the petitioner and the respondent and their legal advisors."

The document was then signed by each party with their signature being witnessed by their solicitors and the date entered.

[18] It is clear from paragraph 3 that the Side Agreement was to protect Mrs Pitman from being reported to the PPS. It succeeded in the sense that she was not reported by Mr Pitman or by anyone acting on his behalf.

[19] However the case now advanced for Mrs Pitman is based on paragraph 2. She contends that when Mr Anderson, acting on her behalf and with her authority, disclosed to the Master the existence of the side agreement in the course of the Section 33 application the matrimonial agreement was rendered null and void. It follows, she says, that her application for ancillary relief should be relisted as provided for in paragraph 4.

Decision of Master Bell

[20] The Master rejected the application made by Mrs Pitman and made the order sought under Section 33. His essential reasoning is set out in paragraph [10] of his decision which reads as follows:

> "I consider that what has occurred in this case is that the wife, who for some reason does not want to honour the agreement she entered into to transfer her interest in the matrimonial home to the husband, is attempting to use the Side Agreement, which was entered into as a shield for her protection from prosecution, conviction and punishment for perjury, as the sword to kill the main matrimonial agreement. This was not in my view the purpose of the Side Agreement and I do not consider that using the ordinary rules of construction it can properly be construed to allow her to do this. The purpose of the Side Agreement was to protect her, not to provide her with a mechanism to fail to honour her obligations should she change her mind about what she had signed up to. The matrimonial agreement which was made a rule of court therefore stands and can be enforced."

[21] The Master also raised, but without reaching a concluded view on it, the question of what the effect is of the matrimonial agreement becoming part of a court order. He considered that there is a significant issue as to whether once the matrimonial agreement has been made a rule of court a previously undisclosed side agreement between the parties can be relied on to nullify an order made by the court.

Evidence on appeal

[22] I have referred above to aspects of the oral evidence given in the course of the appeal by Mrs Pitman and by Ms Murray, solicitor. On the evidence they gave I am also satisfied that:

(i) The sole purpose of the side agreement was to protect Mrs Pitman from being reported and investigated for perjury, that being a real possibility in February 2018.

(ii) Mrs Pitman was unhappy with the settlement in that she had hoped to achieve more but she knew her own evidence had damaged her case significantly on the issue of career detriment, quite apart from the risk of prosecution.

(iii) She welcomed the involvement of Mr McCollum who she said she was "in awe of". Only later did she come to challenge his advice by reference to a definition of perjury (never produced) which she claimed to have found on a Google search.

(iv) The reason for asking the GP to amend her medical records was at least as much to assist her ancillary relief application as it was to protect her from any future request for access to those records by her employer.

(v) Mrs Pitman herself made some contribution to the wording of the side agreement.

(vi) Contrary to her evidence she was not crying hysterically when she signed the agreement even though she was disappointed with the outcome.

(vii) Mrs Pitman who had consulted with her full legal team including Mr McCollum on 20 February was advised on 27 February when she signed the agreement that she did not have to do so and that she did not have to settle her claim.

Submissions

[23] For Mrs Pitman, Mr Fee QC submitted that:

(i) None of the oral evidence which I heard is at all relevant to the court's decision because the wording of paragraph 2 of this side agreement is entirely clear and unambiguous. Once Mrs Pitman disclosed the existence of the side agreement to the Master through her legal advisors the matrimonial agreement became null and void. That is exactly the consequence of paragraph 2 and was known to be so when the parties entered into the two agreements.

(ii) The Supreme Court reaffirmed in *Arnold v Britton* [2015] AC 1619 that the interpretation of a contractual provision involves identifying what the parties had meant through the eyes of a reasonable reader. Save in the very unusual case that meaning was most obviously to be gleaned from the language of the provision. It is not the function of a court to relieve a party from the consequences of imprudence or poor advice.

(iii) The principles of contractual construction are clear from a series of decisions including *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 in which Lord Hodge said:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. …
>
> 13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements."

(iv) The side agreement is enforceable as an agreement in this matrimonial case despite not having been approved by the Master who was unaware of it. The fact that he approved the matrimonial agreement put before him and made it a rule of court does not mean that the side agreement is any less valid and binding. In *Soulsbury v Soulsbury* [2008] 1 FLR 90 the Court of Appeal recognised that the effect of a compromise received different treatment in the Family Division but it had doubts whether it could be stated that ordinary contractual principles did not apply to determine whether a concluded agreement had been reached.

(v) Later in *Sharland v Sharland* [2016] AC 871 the Supreme Court held at paragraph 29 that:

> "…matrimonial cases [are] different from ordinary civil cases in that the binding effect of a settlement embodied in a consent order stems from the court's order and not from the prior agreement of the parties. It does not, however, follow that the parties' agreement is not a sine qua non of a consent order. Quite the reverse: the court cannot make a consent order without the valid consent of the parties. If there is a reason which vitiates a party's consent, then there may also be good reason to set aside the consent order. The only question is whether the court has any choice in the matter."

(vi) On the authorities the side agreement simply cannot be disregarded. The parties are bound by it. And in the present case the consent to the matrimonial agreement was clearly and unarguably subject to the side agreement. The fact that one agreement was made a rule of court and the other was not is immaterial.

(vii) In respect of illegality, the heart of the side agreement is questionable in that it protects the wife from investigation, and perhaps more, for oral evidence she gave which was unquestionably wrong. On that approach the whole contract, the two agreements taken as a composite agreement, falls rather than merely the side agreement.

[24] For Mr Pitman Ms O'Grady submitted that:

(i) The wife's case that she signed the agreements because she was led to believe that she would be prosecuted, convicted and imprisoned is contrary to her own evidence, that of Ms Murray her former solicitor and the written email exchanges and consultation notes. She was advised that she was at risk, not that any consequence was certain.

(ii) It was Mrs Pitman's team who requested the side agreement to protect her from the risk to which she had exposed herself by her answers in cross-examination.

(iii) Referring to *Chitty on Contracts Volume 1* from 13.041 onwards the principles (as opposed to rules) of construction are apparent:

- 13.043 The proper approach to interpretation is "contextual and purposive", not "mechanical" and the overriding aim is to give effect to the intention of the parties objectively ascertained as reflected in the terms of their contract.
- 13.048 The court is concerned both to identify the objective meaning of the language which the parties have chosen and to ascertain what a reasonable person would have understood the parties to have meant.

- 13.049 The courts will in principle look at all the circumstances surrounding the making of the contract and available to the parties which would assist in determining how the language of the document would have been understood by a reasonable person in their position.
- 13.061 Every contract is to be construed with reference to its object and the whole of its terms and accordingly the whole context must be considered in endeavouring to interpret even though the immediate object of inquiry is the meaning of an isolated word or clause.
- 13.063 Although the courts will endeavour to place the clause in dispute in the context of the contract as a whole, it may not be possible to achieve a complete reconciliation of all of the terms of the contract.

(iv) Applying these principles and contrary to the submissions on behalf of Mrs Pitman, paragraph 2 of the side agreement cannot be and should not be considered in isolation from the rest of the side agreement. There is nothing before the court to support the absurd contention that the side agreement was to be available to either party to reopen at any time of their choosing the whole ancillary relief application, whether that be after 3 months, 12 months or 5 years.

(v) The principle of finality of litigation is important. Parties are not and should not be free to walk away from their agreements.

(vi) The authorities of *Soulsbury* and *Sharland* cited for Mrs Pitman do not assist her in the circumstances of this case. They illustrate that while matrimonial agreements are to be approached differently, especially because the interests of dependents have to be protected, the established principles of contractual interpretation are still relevant.

(vii) There is no basis for the proposition that the side agreement, and by extension the matrimonial agreement, are void or voidable because they are tainted with illegality. Mrs Pitman was at risk of being reported, investigated, prosecuted and convicted. That is beyond doubt. She knew and accepted that but wanted to avoid being reported by Mr Pitman or his representatives. The prohibition on them would reduce the risk to which she was exposed. Far from being subject to any coercion or blackmail she herself had reduced the value of her claim – her claim for career detriment had effectively been erased.

(viii) In *Xydhias v Xydhias* [1999] 1 FLR 683 Thorpe LJ referred to the great emotional and psychological stresses to which litigants in ancillary relief are subject. He stated:

> "In my opinion there are sound policy reasons supporting the conclusion that the judge is entitled to exercise a broad discretion to determine whether the

> parties have agreed to settle…. The court has a clear interest in curbing excessive adversariality and in excluding from trial lists unnecessary litigation. A more legalistic approach, as this case illustrates, only allows the inconsistent or manipulative litigant to repudiate an agreement on the ground that some point of drafting, detail, or implementation had not been clearly resolved."

Discussion

[25] The principles to be applied in this case are not in serious dispute. Rather, as is frequently the case, the debate is what their application leads to. For Mrs Pitman it is contended that the matrimonial agreement falls and the whole case resumes because of her own disclosure through her lawyers to the Master of the existence of the side agreement. As it happens the disclosure came within a few months but on her approach the case could be reopened at any time in the future. That, she contends, is the literal and unambiguous effect of the wording of paragraph 2.

[26] I agree that if paragraph 2 is read alone that is the result, however absurd it is in the circumstances. But I do not agree that paragraph 2 should be read alone. To do so would be contrary to what Lord Hodge in *Woods v Capita Insurance Services Ltd* at paragraph 10, cited above. He warned against parsing the wording of a particular clause and this case illustrates exactly why. The presence of paragraph 2 in the Side Agreement represents imperfect drafting but as appears from paragraph 13.063 of *Chitty on Contracts* a complete reconciliation of all of the terms of the contract may not be possible sometimes.

[27] When one considers the overall context and the rest of the side agreement, which exists on her instigation and only to protect Mrs Pitman, it is clear beyond doubt what the contract was intended to achieve – a reduction of the risk to her of investigation and prosecution for perjury. She was of course still at some risk from the Master reporting her. However as proved to be the case he was not overly concerned, when presented with a settlement in February 2018, with discovering what had emerged from inquiries made after she gave the first part of her evidence in September 2017.

[28] In these circumstances I agree with the Master that using the established principles of construction paragraph 2 of the side agreement cannot be read so as to render the matrimonial agreement null and void.

[29] In the event that I am wrong about that, I further hold that a matrimonial agreement approved by the Master and made a rule of court cannot be rendered null and void by a side agreement of which he is unaware and which is deliberately not put before the court. Matrimonial agreements are more than contractual arrangements. There is a particular public interest in them being fair inter alia because they may concern and protect the interests of dependents. That is why the

Master has to consider and approve the terms before making the agreement a rule of court. It is wholly inconsistent with that process for the parties to reach an undisclosed agreement which may, now or in the future, negate or nullify the approved agreement.

[30] In reaching this conclusion I agree with the view tentatively expressed to the same effect by the Master at paragraphs 11-13 of his decision.

[31] The course of action taken by Mrs Pitman in this case after February 2018 is regrettable. I am satisfied that she had time to consider the advice given to her by Mr McCollum QC (and her solicitor and junior counsel) for a week after she consulted with them on 20 February before she signed the agreements on 27 February. It is apparent that subsequently she changed her mind about the agreements and tried to devise an escape. There can hardly be a better or clearer example of what Thorpe LJ was so concerned about in *Xydhias* cited above. The policy reasons for curbing excessive adversariality and bringing finality to litigation could not be more evident.

[32] For the reasons given above the appeal from Master Bell is dismissed and his decision affirmed.